"1. *Entry of Appeal.* On receiving an appeal record under Order XXXIX of the Subordinate Courts Rules, 1950, the Assistant Registrar shall enter the appeal in a list of appeals from Subordinate Courts.

2. *Memorandum of Appeal.* (1) The appellant shall, within fourteen days from the date of service on him of the notice referred to in Order XXXIX, rule 3 sub-rule (2) of the Subordinate Courts Rules, 1950, or within such extended time as the High Court may allow, file in the High Court in duplicate a memorandum of appeal in Form 23 in the First Schedule hereto.

(2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record."

For these reasons I would hold that the proceedings by way of originating motion is not the proper procedure to adopt on an appeal from the decision of the senior inspector of mines. Accordingly I allow this application and set aside the originating motion commencing this action and all subsequent proceedings therein with costs.

Application allowed.

Solicitors: *Cumarasami, Tang & Co.; Richard Talalla & Co.*

RE DEREK SELBY DECD.

[R. Cr. J. (Sharma J.) October 14, 1971]

[Malacca — Criminal Revision No. 6 of 1971]

Criminal Law and Procedure — Revision — Decision of magistrate holding a coroner's inquiry — Whether an inferior court — Criminal Procedure Code (S.S. Cap. 21), ss. 320, 330(2), 332(1), 335(1).

Criminal Law and Procedure — Magistrate holding inquiry into cause of death — Verdict suicide — Whether suicide can be presumed.

An inquiry was held by a magistrate, under section 330(2) of the Straits Settlements Criminal Procedure Code, into the cause of death of one Derek Selby. The learned magistrate recorded a finding that the deceased came to his death by an act of suicide and gave his verdict accordingly. The deceased's wife filed a revision petition in the High Court for the purpose of deciding the correctness, legality or propriety of that finding.

The issue for determination was whether a revision did lie against the finding of a magistrate in a coroner's inquest, under section 335(1) of the Straits Settlements Criminal Procedure Code.

Held, allowing the petition: (1) section 332(1) of the Settlements Code confers all the powers of a court on the magistrate who holds a coroner's inquiry. Thus, a coroner's court is an inferior court of record by virtue of section 320 of the Straits Settlements Criminal Procedure Code. Therefore, in this case the High Court had jurisdiction to entertain the petition for revision;

(2) the learned magistrate had gone wrong in his finding and in his verdict of "suicide". There was no sufficient evidence on record to warrant that finding to the exclusion of any other reasonable hypothesis.

Cases referred to:-

(1) *Queen Empress* v. *Tulja* I.L.R. 12 Bom. 36.

(2) *Emperor* v. *Bhagwandas* A.I.R. 1946 Bom. 184.

(3) *Mahabir Singh* v. *Emperor* A.I.R. 1944 Cal. 17.

(4) *R.* v. *Huntbash, ex parte Lockley* [1944] K.B. 606 at p. 608.

REVISION.

M. Shanker for the petitioner.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the Public Prosecutor.

Sharma J.: An inquiry was held by the magistrate, Jasin under section 330(2) of the Straits Settlements Criminal Procedure Code (= section 333(ii) of the F.M.S. Criminal Procedure Code) into the cause of death of one Derek Selby. At the end of the said Inquiry the learned magistrate recorded a finding that the deceased came to his death by an act of suicide and gave his verdict accordingly.

Mrs. Derek Selby being not satisfied with the finding and the verdict of the magistrate filed a revision petition in the High Court with a view that I should call for the record and satisfy myself as to the correctness, legality or propriety of that finding. The revision finally came up for hearing before me on the 28th August 1971 when I set aside the finding of the magistrate and quashed the verdict he had given. I had some doubts in the beginning whether a revision by Mrs. Selby was at all competent when the magistrate had held an Inquiry under Chapter XXX of the Straits Settlements Criminal Procedure Code (Chapter XXXII of the F.M.S. Criminal Procedure Code). The matter was fully and very ably argued by learned counsel for the petitioner. I was also advised that there was no reported case of our courts dealing with the question of the maintainability of a revision in such an instance and that I should, if possible, write down the reasons why I had ultimately decided that a revision did lie against the finding of a magistrate under section 335(i) of the Straits Settlements Criminal procedure Code. I will now proceed to deal briefly with my initial doubts and why I finally allowed the revision petition.

Section 320 of the Straits Settlements Criminal Procedure Code (= section 323 of the F.M.S. Criminal Procedure Code) reads as follows: —

"(1) The High Court may call for and examine the record of any proceeding before any inferior *Criminal Court* for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court.

(2) Orders made under sections 107 and 108 are not proceedings within the meaning of this section."

The Criminal Procedure Code was amended by Act 25 of 1967. Sub-section (2) of section 320 of the Straits Settlements Criminal Procedure Code prior to this amendment read as follows: —

"(2) Orders made under sections 107 & 108 and *proceedings under Chapter XXX* are not proceedings within the meaning of this section."

The words "and proceedings under Chapter XXX" were deleted from section 320(2) as a result of the amendment made in 1967.

It is only the records of proceedings "before an inferior criminal court" that can be called and examined by a judge of the High Court under section 320(1) of the Settlements Code. The question was whether a magistrate holding an inquiry under Chapter XXX

was a "court". A court is not defined in the Settlements Code but is defined in the F.M.S. Criminal Procedure Code as the High Court, the sessions court or the court of a magistrate. The Interpretation Act, 1967, defines the court as a court of competent jurisdiction. These definitions are not very helpful.

The Penal Code defines the court thus: —

"The word 'court' denotes a judge who is empowered by law to act judicially alone... when such judge... is acting judicially."

Section 19 of the Penal Code defines the word "judge" as "every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment or a judgment, which if not appealed against would be definite, or a judgment which, if confirmed by some other authority, would be definitive...." The pronouncement of a "definitive judgment" is thus considered as the essential *sine qua non* of a court and unless and until a binding and authoritative judgment can be pronounced by a person or body of persons it cannot be said that he or they constitute a court It is thus clear that in order to constitute a court in the strict sense of the term the essential condition is that the court should have, apart from some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which should have finality and authoritativeness. This aspect of the matter created in me serious doubts whether a magistrate acting under Chapter XXX of the Settlements Code could fall within this definition of the "judge". A magistrate sitting in a court house could not constitute a court unless he was performing the functions of a court.

The word "court" is also defined in the Evidence Ordinance but that definition is for the purposes of that Ordinance itself and cannot be extended beyond its legitimate scope. (See *The Queen Empress* v. *Tulja*[1]). A person or persons constituting a court should be entrusted with judicial functions and this of necessity involves a decision on questions which are litigated before it and the decision of such a court has to be in accordance with the law. These two attributes seem to be essential in any judicial pronouncement of the court. It is only when there is *lis inter partes* that a court gives a binding decision in respect of the dispute. It determines matters initiated by parties. It has powers to impose sanctions by way of imprisonment, fine, damages and to enforce obedience to its commands. The right of appeal and the powers of revision are creatures of statute and unless the words of the statute confer the power and the jurisdiction to revise a finding or an order of the magistrate, no revision can possibly lie. If the test of a "definitive judgment" and *"lis inter partes"* is applied to proceedings before a magistrate under Chapter XXX of the Settlements Code can it be said that the magistrate constitutes a court for the purposes of Chapter XXX in spite of the amendment made to section 320(2) in 1967. Does such a magistrate act as a "criminal court" as contemplated in section 320(1) of the Settlements Code? It cannot be said that there is any finality in his finding as to the guilt of any person. He at best only expresses an opinion. He may be of the "opinion" that someone is guilty, but that someone still has to be charged for the offence the magistrate thinks he may be guilty of. He still has to be found guilty by the court which may try him. It is up to the court trying that person to find him guilty or not depending on the evidence which may then be led or produced. The suspect cannot be said to be a party to the inquest. No one can of right cross-examine witnesses at an inquest. In certain cases the magistrate need not hold an inquiry at all (See section 330(1) of the Settlements Code). He has been given certain powers under Chapter XXX to enable him to form his opinion as to cause of death. The opinion he ultimately forms is not a decision and can stand no higher than an order of commitment. It is not a judgment, much less a judgment *inter partes*. Being only an opinion it cannot even be admitted in evidence. A coroner's inquisition is not relevant under any provision of the Evidence Ordinance and is inadmissible in evidence. (See *Emperor* v. *Bhagwandas*[2]).

That, however, was one side of the coin. The other side, the winning side, depicted the prominent provisions of our written law and authority. One could not shut one's eyes and ears to what was so apparent and eloquent. Mr. Shanker who appeared on behalf of Mrs. Selby was of very great assistance to me in dispelling the clouds of doubt which had blurred the vision and in examining the legal landscape in its entirety. The learned deputy had not the slightest doubt whatsoever as to the competency of the revision and the powers of the court to interfere with the finding of the learned magistrate if necessary. The matter presented no difficulty whatsoever either to the learned deputy or to Mr. Shanker. I was thus in a very sorry, almost accursed, position of a man where both the contestants were agreed and I alone perhaps tended to be obdurate and impervious to reason.

The legislature in 1967 having for the first time expressly provided that the provisions of Chapter XXIX of the Settlements Code (dealing with revision) were to apply to all proceedings under Chapter XXX intended that a finding of the magistrate in an inquest was subject to revision. The word "proceedings" used in section 339 of the Settlements Code obviously covers much more than what is connoted by the expression "judicial proceedings". The word "judicial proceedings" is defined in the F.M.S. Criminal Procedure Code but does not appear to be defined in the Straits Settlements Criminal Procedure Code. Reference may be made to the case of *Mahabir Singh* v. *Emperor*[3] as to the interpretation of the words "finding," "sentence," "order" and "proceedings" appearing in section 320 of the Settlements Code.

The very definition of "inquiry" in the Settlements Code envisages that the inquiry under Chapter XXX has to be before a "police court." By virtue of section 24 of the Courts Ordinance 1946 the police courts of the Straits Settlements came to be known as the courts of a magistrate. The First Schedule to the Courts Ordinance 1946 refers to the coroner's courts in the Straits Settlements. In 1967 by the coming into force of the Criminal Procedure Code (Amendment) Act

1967 the entire Chapter XXX of the Settlements Code was repealed and a new chapter substituted therefor. Section 80 of the Courts Ordinance 1948 was amended by the Courts (Amendment) Ordinance 1950 and all the powers, duties and functions conferred on or exercised by the coroner were transferred to the magistrate. Section 332(1) of the Settlements Code confers all the powers of a court on the magistrate who holds an inquiry.

Dr. Mallal in his Criminal Procedure, 4th Ed., at page 485 says: —

"A coroner's inquest is a court of law although no person is accused before him. The coroner examines witnesses on oath and while usually following the ordinary rules of evidence he may admit any evidence which he thinks fit, especially hearsay evidence. His duty is to ascertain the cause of death and he is not bound to follow the usual procedure of law courts. He may exclude the public from court if he considers it desirable in the interests of justice or decency."

Again at page 500 of *Mallal's* Criminal Procedure it is stated that a coroner's court is an inferior court of record.

The Courts of Judicature Act 1964 defines a "subordinate court" as "any inferior court from the decisions of which by reason of any written law there is a right of appeal to any High Court and means in relation to any High Court any such court as by any written law has jurisdiction within the local jurisdiction of such High Court." Wide powers of revision are given to the High Court under sections 31 and 35 of the Courts of Judicature Act 1964.

Again under section 5 of the Settlements Code the law relating to criminal procedure for the time being in force in England may be applied in respect of matters of criminal procedure for which no special provision seems to have been made in our Code provided the English procedure does not conflict with or is not inconsistent with the provisions of our Code.

The following passages appear in *Halsbury's* Laws of England, Third Edition, Volume 9, page 342: —

"Originally the term 'court' meant among other meanings the Sovereign's palace; ... a tribunal may be a court in the strict sense of the term although the chief part of its duties is not judicial. Parliament is a court. Its duties are mainly deliberative and legislative; the judicial duties are only part of its functions. A coroner's court is a true court although its essential function is investigation.

The question is whether the tribunal is a court, not whether it is a court of justice, for there are courts which are not courts of justice..."

Again on page 461 of Vol. 9 of *Halsbury's* Laws of England it is said:

"The coroner's court is a common law court of record and a court of special criminal jurisdiction. The function of the court is to inquire into the cause of death... The coroner's inquisition may be quashed by the High Court."

Reference may also be made to Volume 8 of *Halsbury's* Laws of England, Third Edition, page 529 where it is stated:

"Coroner's inquisitions have been quashed by the High Court in the exercise of their common law jurisdiction upon the following grounds: that the facts set forth in the inquisition did not warrant the finding of the jury; that the inquisition did not sufficiently designate the persons charged with manslaughter; .... that it did not adequately describe the manner of death; that it was wholly irregular in not stating where the death happened or whether the body was found..."

After having considered the weight of authorities referred to above I thought and decided that I had jurisdiction to entertain the revision.

I had no doubt that the learned magistrate had gone wrong in his finding and in the verdict of "suicide" which he had given. He came to the finding by a curious process of reasoning, namely that there could only be three causes of death, *i.e.* (a) accident, (b) murder or (c) suicide. He ruled out accident and murder and thereby alone jumped to the inference that death could only be the result of suicide. There was no sufficient evidence on record to warrant that finding to the exclusion of any other reasonable hypothesis. There was no evidence of any plan or desire on the part of Mr. Selby to commit suicide. All that had been proved was that it was not impossible that the deceased had committed suicide. If it could have been shown that he actually had an intention to commit suicide it would be more probable that he in fact did commit it than if he had no such intention A person may have an opportunity to commit suicide but that does not mean that he committed it. There was no evidence that the deceased had at any time shown any intention to commit suicide (a man does not always carry his intentions into effect!). If it could be shown that during the week before his death the deceased actually attempted to kill himself and was prevented from doing so, it might have afforded some evidence that he had a tendency to commit suicide and might have made a second attempt. If, however, the evidence is not sufficient to come to a definite finding as to the cause of death an open verdict should be recorded.

In *R.* v. *Huntbash, ex parte Lockley*(4) Viscount Caldecote C.J. said:

"Objection is taken to the finding of the coroner on the ground that there was no evidence to support it, and that is the only point in this case. There is no aspersion on or criticism of the coroner's action, except the criticism to which everyone who sits in a court of justice is exposed, namely that a mistake has been made. It is clear that the coroner sought to discharge his duties with diligence and care, and in accordance with the law.

... I am driven to the conclusion that there was nothing in that evidence on which it could properly be said that there was any evidence of suicide. I am satisfied that, if the coroner had been sitting with a jury and had given a proper direction to them, he would have told them: 'Whatever you may guess at, there is no basis of proved fact on which you can return any verdict other than an open verdict.' Section 3 of the Coroners Act, 1887, limits the duties of a jury to acting on evidence which establishes facts and not merely gives rise to surmises. Sub-section (3) of s. 4 is in these terms: 'After viewing the body and hearing the evidence the jury shall give their verdict and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death.' The words 'so far as such particulars have been proved to them' seem to emphasize the duty of the jury or of the coroner to confine themselves or himself to finding such particulars as have been proved by evidence. Here the coroner appears to have been attracted by the theory, which remainder only a theory to the end of the inquest, that Lockley had deliberately made up his mind to escape for ever from grievances under which he was suffering. Passages in his affidavit illustrate how much he

was basing his verdict on guesswork instead of on particulars which had been proved in evidence. The conclusions stated in those passages are nothing more than the expression of a theory which is attractive in its probability. It is not probability, however, which determines verdicts, but proved facts, and, if facts which justify a specific verdict are not proved at an inquest, there is no alternative but to return an open verdict.

We have been referred to *Southall* v. *Cheshire Country News Co. Ltd.* 5 B.W.C.C. 251, a workmen's compensation case. An arbitration had been held by the county court judge as the result of the death of a workman who was said to have committed suicide after an injury which it was admitted that he had received. The county court judge found that the death resulted from the accident which caused the suicidal tendency and awarded the dependents a sum of money. The Court of Appeal held that there was no evidence to justify the finding of the judge. Cozens-Hardy M.R. said: 'Suicide is never to be presumed. In the next place there is no evidence of suicidal tendency. The man's son says he never threatened suicide. There is no one who says he anticipated suicide. Strange to say there is the report of the doctor made on the very day before the accident. He did not think there was any suicidal tendency. The judge seems to have thought it was more likely that the man committed suicide than anything else. The judge is not entitled to act upon a surmise of that nature.' Then the Master of the Rolls cites *Richard Evans & Co. Ltd.* v. *Astley* [1911] A.C. 674 at 679. where Lord Atkinson said: 'One not infrequently finds, in cases under this Act, surmises more or less shrewd of this arbitrator or judge, or conjectures more or less plausible, described as inferences of fact, although there are no data whatever from which the so-called inferences can reasonably be drawn.' The Master of the Rolls goes on to say: 'In the present case there is no evidence to support the finding of suicide.' That was not a case of an inquest by a coroner, but the law as stated by the Master of the Rolls and the other members of the Court of Appeal would seem to apply to the circumstances of the present case. As a coroner is bound by evidence and can find only facts which are proved in evidence and are not the result of mere guesswork, I think that here the coroner was betrayed into a mistake in the verdict at which he arrived.

The question then arises what ought to be the result. That is to be determined in the light of s. 6, sub-s. 1, of the Coroners Act, 1887, and if we find that, by reason of insufficiency of inquiry or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held we may make an order to that effect. In the exercise of our powers under s. 6, sub-s. 1, I think the inquisition on the inquest which has been held should be quashed, and, inasmuch as it is desirable, in the interests of justice, that there should be a proper inquisition, that another inquest should take place. The coroner will confine himself to establishing facts so far as he can by evidence and then give a verdict which is supported by the facts which have been proved."

The law is that suicide is not to be presumed.

It was for the above reasons that the finding of the learned magistrate was set aside and his verdict of suicide quashed by me and I substituted an open verdict instead.

Verdict of suicide quashed.

Open verdict substituted.

Solicitors: *Shearn, Delamore & Co.*

MELAN BIN ABDULLAH & ANOR. v. PUBLIC PROSECUTOR

[A. Cr.J. (Ong C.J. (Malaya)) November 2, 1971]

[Kuala Lumpur — Criminal Appeal No. 103 of 1971]

Criminal Law — Sedition — Publication in newspaper — Liability of editor — Responsibility for negligence — Editor not failing in higher standard of care and caution required of him — Seditious tendency — Presumption of law raised by amendment to Sedition Act — Sedition Act, 1948 (Act 15 as amended), ss. 3(1)(f), (3), 4(1) (c), 5(1) & 6(2).

On April 6, 1971, the *Utusan Melayu* newspaper published a report of a talk given by a prominent Malay leader and member of Parliament. In the report was an editorial sub-heading, which, in the English translation reads: "Abolish Tamil or Chinese medium schools in this country."

The first appellant was the editor-in-chief of the *Utusan Melayu,* and the second appellant the author of the sub-heading inserted in the report. Sanction for their prosecution was given under section 5(1) of the Sedition Act 1948, and they were tried in due course in the special sessions court on a charge of publishing a seditious publication in contravention of section 4(1)(c) of the Sedition Act, punishable under the same section. The learned special president held the publication to be seditious, that the first appellant "was responsible for all publications in the *Utusan Melayu*", that the second appellant was the author of the impugned sub-heading, and that consequently they were both guilty. They were convicted and fined the sum of $500 and $1,000 respectively, in default one month and two months' imprisonment.

The first appellant had given evidence of the responsibilities of his office, as editor-in-chief, over as many as ten publications of the *Utusan Melayu* group. He had perforce to delegate authority to trusted subordinates. On the Sedition Act, he had organised seminars and discussions, relating in particular to the "sensitive issues" and had instructed his staff on the relevant law as he understood it.

Held: (1) the first appellant had taken all precautionary measures necessary and he had not failed in the high standard of care and caution required of him, and accordingly his conviction must be set aside;

(2) the second appellant was responsible for the sub-heading which clearly violated what was laid down in proviso (a) to article 152 of the Federal Constitution and therefore came within the definition of "seditious tendency" as extended by the new section 3(1)(f) which was added to the Sedition Act, 1948; he was therefore rightly convicted of sedition.

Per Ong C.J.: "...By virtue of the 1970 amendment to the Sedition Act, 'sedition' no longer requires the same judicial approach as the misdemeanour at common law. The amendment was *ad hoc* legislation, passed to meet the special needs and circumstances of the time. The duty of the court is to interpret and uphold the law as passed by Parliament. Whether or not paragraph (f) fits into the common law concept of sedition is wholly beside the point. It does give, however, a new and, perhaps, highly artificial meaning to what used to be considered 'seditious tendencies'. English and Indian authorities are, therefore, of little relevance and are not referred to herein. In my view paragraph (f) is unique in that it raises a presumption of law that anything falling squarely within the terms thereof has a seditious tendency, irrespective of whether or not such thing sows any seeds of disaffection..."

Cases referred to:-

(1) *Sweet* v. *Parsley* [1970] A.C. 132, 157.

(2). *Lim Chin Aik* v. *R.* [1963] M.L.J. 50, 53, P.C., [1963] A.C. 160, 174.

MAGISTRATES CRIMINAL APPEAL.

Kamarul Ariffin bin Mohamed Yassin (*Raja Abdul Aziz* and *Yaacob* with him) for the appellants.

Hashim bin Y.A. Sani (*Gunn Chit Tuan* with him) (Deputy Public Prosecutors) for the respondent.